

New Department of Education Regulations Require Colleges to Amend Employment Policies

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Recently, the U.S. Department of Education issued new regulations implementing amendments to the Violence Against Women Act (VAWA), which applies in all cases where colleges face allegations of sexual assault, domestic violence, dating violence, or stalking. Most colleges are well on their way to revising the notifications they must provide, their investigations, and their disciplinary proceedings to comply with these regulations as they apply to students. The regulations, however, also apply to employees, including faculty members, who are the accuser or the accused when one of the covered offenses-sexual assault, domestic violence, dating violence, or stalking-is alleged. Just as policies for students must be revised, employment policies need to comply with the new regulations. As a result, higher education employers should make sure their employment policies provide the following in situations involving allegations of sexual assault, domestic violence, dating violence, or stalking:

1. Colleges must provide information to victims about the importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or that may be helpful in obtaining a protection order.
2. Colleges must provide written notification that it will make accommodations and provide protective measures for the victim-if requested and reasonably available-and must notify victims of how to request those accommodations or protective measures.
3. Colleges must provide information about disciplinary procedures for allegations of dating violence, domestic violence, sexual assault, and stalking in its Annual Security Report, along with information on how to file a disciplinary complaint.
4. Colleges must identify their institutional disciplinary proceedings for cases of dating violence, domestic violence, sexual assault, or stalking. Colleges must also ensure that its disciplinary proceedings are fair, prompt, and impartial to both the accused and the accuser. Among other things, this means that both the accused and the accuser must have the opportunity to have an advisor of their choice present during proceedings. Also, proceedings must be conducted by officials who have received training on sexual assault issues and how to conduct proceedings that protect victims' safety and promote accountability. An institution must describe each type of disciplinary proceeding that it uses, including those used for faculty and staff.
5. Colleges must notify the accuser and the accused that they are entitled to use an advisor during any "proceeding" the college conducts in connection with the disciplinary process. The regulations make clear that colleges must permit attorneys to be advisors. This applies to faculty and staff, as well, and colleges that do not currently allow attorneys to represent employees in internal proceedings must do so in these types of cases. The regulations, however, do not require that a college provide an attorney to anyone, although some colleges have opted to do so. Further, a college may limit an advisor's role, and many colleges have concluded that the advisor should be just that, an advisor but otherwise not an active participant in the process. The regulations permit the college to take

appropriate steps if the advisor/attorney oversteps this role.

6. Colleges should give as much notice as possible to the accused and the accuser about their right to an advisor and give them the opportunity to select one before conducting any "proceedings," which would include the investigation. Interim protective measures for the victim, however, are not "proceedings."

7. College policy must specify which evidence standard will be used in evaluating cases involving domestic violence, dating violence, sexual assault, and stalking. Title IX regulations require a "preponderance of the evidence" for sexual assault matters. Colleges are free to select a different standard of proof for the other three offenses, but whatever standard used must be adopted as part of the policy so that those who participate in the proceedings know the standard in advance. Colleges should carefully examine their current human resource policies in light of the new regulations. Undoubtedly, most colleges will need to change or enhance their notifications to staff and faculty, and perhaps their investigative and disciplinary practices. Certainly, colleges will need to prepare for situations when accusers and accused will have advisors, including outside attorneys. Several Barley Snyder attorneys are familiar with the Department of Education's regulations related to employees and students and can assist colleges and universities in complying with the new regulations.